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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK ACOSTA, JR., Defendant and Appellant.	G053480 (Super. Ct. No. 15CF1892) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Frank Acosta, Jr., of transportation and possession for sale of methamphetamine. (Health & Saf. Code, §§ 11378, 11379, subd. (a).) Defendant admitted having six prior convictions for possession of a controlled substance, three prior convictions for transportation of a controlled substance, and the service of three prior prison terms. The court sentenced defendant to 10 years.

Defendant challenges the sufficiency of the evidence to prove he possessed methamphetamine, or in the alternative, that he possessed methamphetamine for sale. Defendant also contends the court failed to rule on his oral motion for a new trial, or in the alternative, that his attorney's failure to pursue a motion for a new trial amounts to ineffective assistance of counsel. We reject defendant's arguments and affirm the judgment.

FACTS

On the morning of August 21, 2015, Santa Ana Police Officer Greg Beaumarchais and Corporal Jose Mendoza were assigned to patrol an area including the 300 block of North Sullivan Street. It is a "high-crime" neighborhood with a large, transient population and frequent drug activity. Around 11:15 a.m., Beaumarchais stopped their patrol car and got out to talk to a pedestrian. Mendoza stayed in the car. As Beaumarchais spoke to the pedestrian, he saw and recognized defendant, who was riding a bicycle in the street. Beaumarchais yelled, "Frank stop." Defendant did not stop. He told Beaumarchais he was late and kept going.

Mendoza and Beaumarchais followed defendant in their patrol car as he continued down the street. From about 100 to 150 feet away, Beaumarchais saw defendant ride onto the sidewalk. Defendant seemed to lose his balance at one point. Beaumarchais testified defendant looked "as if he was going to fall similar to if I was riding a bike with one hand on the handlebars and I went over something unstable." However, Beaumarchais could not see defendant's hands or feet due to parked cars.

Mendoza activated the patrol car's overhead lights and siren, and defendant stopped. Beaumarchais told defendant to get off his bicycle, and he handcuffed and searched defendant when defendant complied. Beaumarchais found a cell phone, wallet, and keys in defendant's right front pants pocket. However, the lining of defendant's left front pants pocket had been pulled out.

Beaumarchais suspected defendant had reached into his left pants pocket and tossed something out when defendant briefly lost control of his bicycle. Beaumarchais told Mendoza to back track defendant's route and look for anything defendant might have dropped. As a result, Mendoza found a plastic baggie containing an approximately 23-gram rock of methamphetamine about 20 feet away from where Beaumarchais had seen defendant appear to lose control of his bicycle. At the time, there were no other people, bicyclists, or cars in the area. Mendoza testified the plastic baggie was not covered with dirt or debris, and it did not appear to have been on the ground very long.

At trial, Beaumarchais testified as the prosecution's drug expert. Beaumarchais said 23 grams of methamphetamine would provide around 230 individual doses, and it had a street value of approximately $1,800. Beaumarchais had not previously come into contact with anyone who possessed such a large amount of methamphetamine for personal use, and he had never seen a single rock of methamphetamine of that quantity "in the street."

According to Beaumarchais, methamphetamine is usually used and sold in a powdered form. The typical user possesses a gram or less of methamphetamine, at a cost of about $20, although some users purchase as much as an eighth of a gram at a time.

In addition, people generally smoke, snort, or inject methamphetamine and each method requires different paraphernalia to effectuate. After ingestion, methamphetamine causes elevated heart rates, dilated pupils, and agitated, fidgety behavior. Based on the quantity, form, and packaging of the methamphetamine, and the

absence of evidence defendant personally used the drug, Beaumarchais opined defendant possessed the methamphetamine for sale.

On cross-examination, Beaumarchais admitted defendant did not possess a scale, pay/owe sheets, or cash, as is common with drug dealers, and there were no incriminating text messages on his cell phone. Furthermore, Beaumarchais admitted he did not test defendant for the physical signs of methamphetamine ingestion before his arrest, and he and Mendoza made no effort to find another source of the methamphetamine.

DISCUSSION

1. *Sufficiency of the Evidence to Prove Possession and Intent*

Defendant challenges the sufficiency of the evidence to prove he possessed the methamphetamine, and that he possessed and transported methamphetamine for sales.

a. Standard of Review

Our Supreme Court has repeatedly articulated the applicable standard of review as follows: "'[W]e review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

We view the evidence in the light most favorable to the prosecution and do not reweigh the credibility of witnesses, or reassess evidentiary conflicts. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same legal standard applies when, as here, the prosecution relies primarily on circumstantial evidence.

"An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396, overruled on other grounds in *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.)

Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. (*People v. Rodrgiuez* (1999) 20 Cal.4th 1, 11.)

b. Possession

Defendant contends the prosecution failed to produce any direct evidence linking him to the discarded methamphetamine. Defendant believes the absence of direct evidence he discarded the methamphetamine means the judgment is based on insufficient evidence. But the absence of direct evidence connecting defendant to the methamphetamine is not dispositive. Convictions for transportation and possession for sale of controlled substances may be based on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746 (*Meza*).)

Viewed in the light most favorable to the judgment, the facts are Beaumarchais recognized defendant and told him to stop, but defendant refused. Beaumarchais watched defendant from a distance of 100 to 150 feet away while defendant rode his bicycle down the street and onto the sidewalk. Beaumarchais saw defendant almost lose control of his bicycle, and when he contacted defendant, it looked like defendant had discarded something from his left front pants pocket.

Beaumarchais's suspected defendant may have discarded something, and he asked Mendoza to retrace defendant's route and take a look. About 20 feet away from the place where defendant almost lost control of his bicycle, Mendoza recovered a plastic baggie containing over 23 grams of methamphetamine. Mendoza said the baggie appeared free of dust and debris, and looked as if it had been recently deposited on the ground. Moreover, there were no other pedestrians, bicyclists, or motorists in the area.

Based on these facts, the jury could have reasonably deduced from the evidence defendant dropped the baggie containing over 23 grams of methamphetamine in response to seeing Beaumarchais and hearing his order to stop. (*People v. Maciel* (2013)

57 Cal.4th 482, 515 (*Maciel*).) Thus, substantial circumstantial evidence supports the jury's conclusion defendant possessed the discarded methamphetamine.

c. Intent to Sell

Defendant also challenges the sufficiency of the evidence to prove possession with the intent to sell. "Unlawful possession of a controlled substance for sale requires proof the defendant possessed the contraband with the intent of selling it and with knowledge of both its presence and illegal character." (*Meza, supra,* 38 Cal.App.4th at pp. 1745-1746; *People v. Harris* (2000) 83 Cal.App.4th 371, 374 (*Harris*).) "Intent to sell may be established by circumstantial evidence." (*Harris*, at p. 374.)

Moreover, "[i]n cases involving possession of [controlled substances], experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld." (*People v. Newman* (1971) 5 Cal.3d 48, 53, disapproved on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 861.) In most circumstances, "it is for the jury to credit such opinion or reject it." (*Harris*, *supra,* 83 Cal.App.4th at p. 375.)

In this case, the jury credited Beaumarchais's expert testimony. Beaumarchais testified 23 grams of methamphetamine would provide around 230 doses with a street value of approximately $1,800. He had never contacted a user with such a large amount of methamphetamine, nor had he ever seen a single rock of methamphetamine of that size "in the street."

Because the typical user possesses a gram or less of methamphetamine, with a street value of about $20, the quantity and form of the methamphetamine was significant. In addition, defendant had none of the paraphernalia necessary to ingest the methamphetamine, nor did he exhibit any signs of being under the influence of methamphetamine. Based on the quantity and form of the methamphetamine, Beaumarchais's expert testimony, and the absence of any indication defendant personally

used methamphetamine, the circumstantial evidence supports the jury's conclusion defendant possessed the methamphetamine with the intent to sell. (*Maciel*, *supra*, 57 Cal.4th at p. 515.)

2. New Trial Motion

a. Factual Background

Both parties filed sentencing briefs prior to the sentencing hearing. Although defendant's maximum possible sentence was 58 years, the prosecutor requested the court impose a 10-year term. Citing his well-established drug addiction and cooperation with police, defendant's attorney urged the court to impose a six-year term.

At the hearing, the court acknowledged receipt and consideration of the parties' sentencing briefs and the probation department's plea and sentencing report. Defense counsel orally requested the court "take judicial notice of all the evidence heard in the trial." After obtaining defendant's admission to his numerous prior drug convictions, the court cited defendant's extensive criminal record, and his past opportunities and failures at drug rehabilitation, and gave an indicated sentence of 10 years. The court noted defendant's prior drug convictions made him ineligible for probation (Pen. Code, §§ 1203, 1203.07, subd. (a)(11)).

After giving the indicated sentence, the court obtained a waiver of defendant's appearance at any potential future sentencing hearing, and then mused, "Our intention is to do the right thing legally, but we do make mistakes because we're all human beings." Defendant replied, "You can always strike the enhancements." But, the court declined the invitation, stating, "unfortunately, sir, with your record and the number of prior convictions that you have, sir, I would be very hard-pressed and it would be very difficult for me to articulate on the record why this would be an unusual case or in the interest of justice to do what I've already done for you, sir." The court also pointed out that while riding "a bike carrying drugs, in the big scheme of things, yeah, it's not the crime of the century but it is necessarily a crime."

Defendant responded, "What about the evidence that was presented? You heard it; right?" The court replied, "Yeah, I heard it. I heard the evidence, sir. [¶] The jury spoke. I can't sit as a 13th juror and say they were wrong or right. That's not my call, you know. They do their job and I kind of do mine. [¶] But I think given the facts, sir, that you're maximum is I think 58 years or something and given the fact that, to be honest with you, I was looking to give you a lot more time but when the D.A. came at 10 [years], I thought she has a pretty good perspective I think how you fit in the system and where you fit on that scale from -- you know, and so I brought my numbers down quite a bit and thought that 10 [years] would be an appropriate sentence for you, sir." Following these observations, the court imposed the indicated sentence of 10 years.

b. Argument

Defendant asserts his question, "What about the evidence that was presented? You heard it; right[,]" amounts to an oral motion for a new trial on grounds of insufficiency of the evidence. (Pen. Code, § 1181, subd. (6) [order for new trial appropriate "[w]hen the verdict or finding is contrary to law or evidence"].) Relying on the court's response that it could not be "a 13th juror," defendant argues the court understood his motion for a new trial, but improperly "refused to consider its duty to independently assess the evidence" and make a ruling. We are not persuaded.

The Attorney General contends the court did not understand defendant's question to be a motion for a new trial. We agree. The interchange occurred during the sentencing hearing. At the time, the parties disagreed on the appropriate length of defendant's sentence. Defendant wanted something less than 10 years. In his effort to obtain a more favorable sentence, defendant and his attorney wanted the court to consider all the evidence in his favor. In this context, defendant's question and the court's response clearly pertain to defendant's sentence and not a motion for a new trial. Moreover, we do not believe the court's mention of a "13th juror" means the court understood defendant's question to be a motion for a new trial.

"The statement by the trial judge that 'the Court sits as a thirteenth juror' has an unfortunate connotation; the phrase is misleading, and it does not properly describe the function of the trial judge in passing upon a motion for a new trial. As we have seen, it is the province of the trial judge [on a motion for new trial] to see that the jury intelligently and justly performs its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict." (*People v. Robarge* (1953) 41 Cal.2d 628, 634.) Seen in this light, that the court did not discuss or engage in an independent assessment of the evidence, supports our conclusion the court did not understand defendant's question as a motion for a new trial. (*Id.* at pp. 633-634; *People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251-1252.)

However, assuming the court understood defendant's question as a motion for a new trial, the Attorney General also argues defendant forfeited his appeal by failing to obtain a ruling. Again, we agree. Assuming defendant wanted a new trial, it was incumbent upon him to press for a ruling. (*People v. Braxton* (2004) 34 Cal.4th 798, 813 (*Braxton*).) However, other than a single oblique reference to "the evidence presented," defendant made no effort to ensure the court made a ruling. When defendant failed to press his point after the court indicated it either did not understand his motion, or was unwilling to make a ruling, defendant forfeited his right to a new trial. (*Ibid.*)

Moreover, even assuming no forfeiture, a trial court's refusal or failure to hear or determine a motion for new trial requires reversal only if there is a miscarriage of justice within the meaning of article VI, section 13 of the California Constitution. (*Braxton, supra,* 34 Cal.4th at pp. 816-817 [error in refusing to hear a defendant's motion for a new trial subject to harmless error analysis].) A miscarriage of justice is established if a defendant shows a reasonable probability he would have obtained a more favorable result if the error had not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

Braxton guides our prejudice analysis. There, the court considered the effect of the constitutional rule that a judgment of conviction will be set aside only when necessary to prevent a miscarriage of justice on Penal Code section 1202.[1] (*Braxton, supra,* 34 Cal.4th at p. 815.) The court explained, "[Penal Code] section 1202 entitles a defendant to a new trial when the trial court has refused to hear or neglected to determine a defendant's motion for a new trial and a reviewing court has properly determined that the defendant suffered actual prejudice as a result. This will occur when, for example, the reviewing court properly determines from the record that the defendant's new trial motion was meritorious as a matter of law, or the record shows that the trial court would have granted the new trial motion and the reviewing court properly determines that the ruling would not have been an abuse of discretion. [Citation.] In these situations, the trial court's error has resulted in a miscarriage of justice within the meaning of article VI, section 13, of the California Constitution.

"On the other hand, a judgment of conviction may not be reversed and a new trial may not be ordered for a trial court's failure to hear a new trial motion when a reviewing court has properly determined that the defendant suffered no prejudice as a result. This will occur when, for example, the record shows that the trial court would have denied the new trial motion and the reviewing court properly determines that the ruling would not have been an abuse of discretion, or the reviewing court properly determines as a matter of law that the motion lacked merit. [Citations.]" (*Braxton, supra,* 34 Cal.4th at pp. 817-818.)

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[1] Penal Code section 1202 states, "If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in Section 1191, why judgment should not be pronounced, it shall thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of Section 1191, then the defendant shall be entitled to a new trial. If the court shall refuse to hear a defendant's motion for a new trial or when made shall neglect to determine such motion before pronouncing judgment or the making of an order granting probation, then the defendant shall be entitled to a new trial."

Defendant's case falls into the latter category. There is no indication the court would have ordered a new trial, given the sufficiency of the evidence adduced at trial. Beaumarchais and Mendoza's testimony established sufficient circumstantial evidence of defendant's guilt. Absent finding a witness's testimony "physically impossible or inherently improbable," the "testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

While the court noted defendant had not committed, "the crime of the century," the court did conclude defendant committed a crime, and there is no indication the court had any trouble with the verdict. Thus, the court could have properly denied a motion for a new trial based on grounds of insufficiency of the evidence; and defendant has failed to establish a reasonable probability of a better result had the court understood and ruled on his new trial motion. (*Braxton, supra,* 34 Cal.4th at pp. 817-818.)

3. *Ineffective Assistance of Counsel*

Defendant's related ineffective assistance of counsel claim must also fail. To be entitled to relief based on a claim of ineffective assistance of counsel, the burden is on the defendant to show "(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*).)

The record in this case sheds no light on defense counsel's failure to move for a motion for a new trial. When the record sheds no light on a defense attorney's decision making, an appellate court will affirm the judgment unless there could be "'no satisfactory explanation'" for counsel's actions. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) Although defendant disagrees, there is a satisfactory explanation for defense counsel's actions in this case. The record provides no viable basis for a new trial motion based on insufficient evidence. (Pen. Code, § 1181, subd. (6).) "Counsel does

not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile." (*People v. Price* (1991) 1 Cal.4th 324, 387.)

Defense counsel's failure to move for a new trial was not ineffective assistance of counsel. But assuming otherwise, defendant also fails to persuade us the result of his trial was fundamentally unfair or unreliable. (*Strickland*, *supra*, 466 U.S. at p. 694.)

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.